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IN THE SUPREME COURT OF THE UNITED STATES

EDGEWOOD AMERICAN LEGION
POST #448, INC.

PETITIONER

vs. NO. 653

UNITED STATES OF AMERICA

RESPONDENT

PETITION FOR WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

EDGEWOOD AMERICAN LEGION POST #448, INC.	)	
PETITIONER	)	
vs.	)	CAUSE NO.
UNITED STATES OF AMERICA	)	
RESPONDENT	)	

PETITION FOR WRIT OF CERTIORARI

The petitioner herein, Edgewood American Legion Post #448, Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit in the above cause.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, is reported in Edgewood American Legion Post #448, Inc., vs. United States of America, 246 F.2, 1. (Appendix A, infra, pp. 11 to 17)

The opinion of the United States District Court for the Southern District of Indiana, Indianapolis Division, has not been officially reported. (See Appendix Record on Appeal, pp. 5-12.)

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 12th day of June, 1957. On June 27, 1957, pursuant to Rule 25 of said Court, petitioner filed its petition for rehearing which was denied on the 9th day of September, 1957. This Court has jurisdiction to review this case, by virtue of 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether or not a necessary finding of fact and conclusion of law as to the tax status of this petitioner, entered as a part of a final judgment, unappealed from, by a court of competent jurisdiction in an action to which this petitioner was not a party but to which the respondent was a party, is conclusive as res judicata or collateral estoppel against the respondent in a subsequent action between this petitioner and the same respondent involving the same identical claim.

2. Whether or not the United States Court of Appeals properly discharged its functions and obligation in affirming a judgment of a United States District Court founded upon erroneous findings of fact and erroneous conclusions of law, which said errors were the basis of the appeal to the United States Court of Appeals, without correcting said erroneous findings of fact and conclusions of law.

3. Whether or not the provisions of 1939 Internal Revenue Code Sections 421 and 422 (26 U.S.C. 1952 ed., Sec. 421 and 422) have any applicability to the Federal Income Tax status of any income of an organization exempt from Federal Income Tax under the provisions of 1939 Internal Revenue Code Section 101(8) (26 U.S.C. 1952 ed., Sec. 101(8)).

4. Whether or not the applicability or non-applicability of 1939 Internal Revenue Code Sections 421 and 422 (26 U.S.C. 1952 ed., Sec. 421 and 422) to the Federal Income Tax status of unrelated business income of an organization exempt from Federal Income Tax in any way affects its status as an exempt organization for the purpose of any other law which refers to organizations exempt from income taxes in view of the express wording of the final paragraph of 1939 Internal Revenue Code Section 101 (26 U.S.C. 1952 ed., Sec. 101).

5. Whether or not a baseball pool constitutes a wagering pool with respect to a sports event as defined in 1939 Internal Revenue Code Section 3285(b)(1)(B). (26 U.S.C. 1952 ed., Sec. 3285(b)(1)(B).

6. Whether or not the magnitude of the businesses owned and operated by the petitioner and their operation by high-salaried employees, otherwise exempt from wagering excise tax, deprives the petitioner of the benefit of the specific exemption afforded by the provisions of 1939 Internal Revenue Code Section 3285(b)(2)(B). (26 U.S.C. 1952 ed., Sec. 3285 (b)(2)(B)).

7. Whether or not a United States Court of Appeals properly discharges its function in affirming what it believes to be a proper judgment even though it may not agree with the reasoning employed by the trial court in arriving at the result.

STATUTES INVOLVED

The Statutes involved in this case, are appended hereto and marked Appendix B. They are as follows:

26 U.S.C. 1952 ed., Sec. 101
26 U.S.C. 1952 ed., Sec. 421
26 U.S.C. 1952 ed., Sec. 422
26 U.S.C. 1952 ed., Sec. 3285
26 U.S.C. 1952 ed., Sec. 3290

STATEMENT OF THE CASE

This action was brought in the United States District Court for the Southern District of Indiana, Indianapolis Division, to recover wagering excise tax paid by the petitioner pursuant to a purported assessment made by the Commissioner of Internal Revenue, and notice and demand by the then Collector of Internal Revenue for the Indianapolis Division, under the provisions of 1939 Internal Revenue Code Section 3285. (26 U.S.C. 1952 ed., Sec. 3285). Jurisdiction is conferred upon the United States District Court in such cases, and the United States of America was made a party to said action because the Collector of Internal Revenue who collected the alleged taxes, was not in office at the time the action was commenced, all as provided in Title 28, Section 1346(a)(1)(ii) (c. 646, Section 31, 62 Stat. 933, as amended). All jurisdictional allegations, including the timely filing of claim for refund and the denial thereof, were admitted by respondent.

The tax involved was allegedly assessed jointly and severally against this petitioner, one Leo R. Alhand, and one John Brookes, upon the supposition that the petitioner and the two individuals were joint adventurers in the operation of two business enterprises known as ABC Lottery and Brooks Baseball Pool. At the time the assessment was made, Leo R. Alhand was deceased and the United States of America filed its claim in the Probate Court of Marion County, Indiana, against the estate of Leo R. Alhand, deceased, based upon the identical assessment involved in this litigation. This claim was subsequently litigated in a full adversary proceeding, evidence heard, briefs on both law and facts submitted, findings of fact and conclusions of law made, and judgment entered against the United States of America, by the Judge of the Probate Court of Marion County, Indiana. Motion for new trial was filed by respondent, which was overruled and the cause was not thereafter appealed. As a part of its findings of fact and conclu-

sions of law, the Probate Court of Marion County, Indiana, necessarily determined the tax status of this petitioner and found that the petitioner was not subject to wagering excise tax under 1939 Internal Revenue Code Section 3285, and that it was not a taxpayer under the provisions of Internal Revenue Code Section 3290.

The action herein sought to be reviewed, was instituted subsequent to the entering of judgment in the Probate Court of Marion County, Indiana, and this petitioner filed its motion for summary judgment in this proceeding, basing said motion upon the final judgment of said Probate Court, the contention being advanced in both the District Court and before the United States Court of Appeals, that the findings of fact and conclusions of law necessarily found by the Probate Court were res judicata or collateral estoppel as to the same issues appearing in this litigation, in keeping with the opinion entered by this Court in Commissioner v. Sunnen, 333 U.S. 591, 92 L. ed. 898 (1947), and numerous other cases relied upon by the petitioner in its brief before the United States Court of Appeals.

Upon the trial of this cause in the District Court, it was stipulated that this petitioner is an American Legion Post exempt from the payment of Federal Income Taxes pursuant to the provisions of 1939 Internal Revenue Code Section 101(8), but the respondent urged that its exempt status had been lost because of the provisions of 1939 Internal Revenue Code Sections 421 and 422 relating to the income tax status of unrelated business income. Upon these representations accepted by the Judge of the District Court, respondent was permitted to introduce evidence as to the volume of business done by these two business enterprises, and as a direct result thereof, the District Court, while it found that petitioner at all times was and still is an organization exempt from tax under Internal Revenue Code Section 101(8), it nonetheless was not entitled to the exemption from wagering excise tax granted it under the provi-

sions of 1939 Internal Revenue Code Section 3285(b)(2)(B). The District Court further found that Code Sections 421 and 422 did apply to organizations exempt under Section 101(8). Petitioner urged in the District Court and again by its assignments of error on appeal, that such findings and conclusions are clearly contrary to law, and that notwithstanding the right of this petitioner to recover the tax monies paid, such findings and conclusions should not be permitted to stand as a part of the body of law entered by our various courts in the further extension of the applicable taxing statutes.

Upon the trial of this cause it was urged by the respondent that this petitioner and Mr. Alhand and Mr. Brookes were joint adventurers in an effort to convince the court that this petitioner did not receive all the net proceeds from the operation of the two business enterprises involved. The District Court gave full faith and credit to the findings of the Probate Court of Marion County, Indiana, as to the relationship between this petitioner and Alhand, but upon identical evidence, found the petitioner and Mr. Brookes to be joint adventurers. The Court of Appeals swept aside these findings and assumed for the purpose of its decision, that the parties were not joint adventurers. The evidence in the District Court clearly showed that the original assessment under which the taxes herein were paid, had in fact been abated as to this petitioner, and that unless the parties were in fact joint adventurers, there was no assessment against this petitioner and the taxes sought herein to be recovered should have been refunded. These facts and circumstances were ignored both in the District Court and in the Court of Appeals notwithstanding they were urged by the petitioner in both courts.

Throughout this litigation the petitioner has further urged its right to refund of the taxes paid because of the exemption from wagering excise tax granted under the provisions of 1939 Internal Revenue Code 3285(b)(2)(B). The petitioner produced evidence at the trial of

this cause to show that the ABC Lottery was a lottery, the outcome of which was based purely on chance, and that the Brooks Baseball Pool, while using numbers arrived at from the use of baseball scores, in season or out of season, was in fact the same thing as a lottery, the results dependent purely upon chance, and not in any sense dependent upon the outcome of any sports event. The respondent has urged that the operation of a baseball pool constituted the placing of wagers in a wagering pool with respect to a sports event, and that in such case, this type of wagering activity was not included within the exemption provided by Internal Revenue Code Section 3285(b)(2)(B).

The District Court in entering its judgment, made 23 findings of fact and 9 conclusions of law and, on appeal to the Circuit Court of Appeals, petitioner objected to 7 of such findings of fact as being not supported by the evidence, and objected to 7 of the conclusions of law as being contrary to law and to the evidence. In entering its judgment affirming the District Court, the Court of Appeals stated that it would "affirm a proper judgment even though we may not agree with all the reasoning employed by the trial court in arriving at the result," and by this action failed to correct the obvious errors appearing in the District Court record, which the petitioner now seeks the assistance of this Court to correct, by examination of the issues hereinbefore set out.

REASONS FOR GRANTING THE WRIT

The Supreme Court of the United States was first called upon to render its decision with reference to legislation pertaining to wagering excise tax in the case of U. S. v. Kahriger, 345 U. S. 22, 73 S. Ct 510, wherein certain criminal sanctions were being asserted for failure of the defendant to comply with the provisions of 1939 Internal Revenue Code Sec. 3290. The

Supreme Court has, however, never been called upon to decide the applicability of Section 3285 to various types of wagering activity sought to be taxed by that section, and neither has the court been asked to determine the limitations or applicability of the provisions exempting certain exempt organizations from the imposition of wagering excise tax.

Both before and after the passage of this legislation there were various exempt organizations, be they charitable, religious, or patriotic organizations which were then engaged in various types of gambling activity, some types of which the respondent has sought to bring within the provisions of the wagering tax laws and others of which have continued to remain untaxed. This petitioner does not seek certiorari on the basis that this type of legislation is not tax legislation, but is regulatory in nature, yet by the administrative inconsistency of its application, the Commissioner of Internal Revenue is placed in an autonomous position to determine without interference what exempt organizations and what types of gambling activity he will seek to extinguish by the imposition of this tax.

In the instant litigation, the United States of America, through error, in the United States District Court is the beneficiary of a finding that organizations exempt from income tax under 1939 Internal Revenue Code Section 101(8), are subject to the provisions of Sections 421 and 422, not only thereby losing their exempt status as to income tax, which was not the true subject of this litigation, but also losing their exempt status with reference to any other act referring to organizations which are exempt. By its failure to correct this error alone, and without reference to the actual merits of this litigation, the Circuit Court of Appeals permits to stand as the law, that which is clearly contrary to the express provisions of 1939 Internal Revenue Code Sections 101, 421, and 422. The Supreme Court of the United States as the final arbiter in such matters,

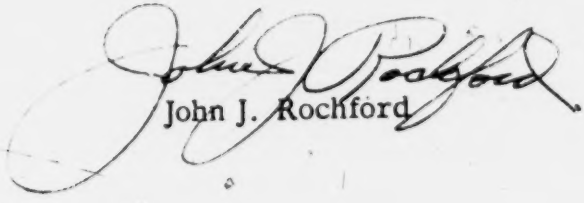
should not permit such extensions of the law of the land by judicial legislation.

The Congress of the United States in enacting the Revenue Code of 1951, by which legislation there was added to the 1939 Internal Revenue Code, Sections 3285 and 3290, failed to define the types of activity to be made subject to the wagering excise tax in sufficient particularity as to permit the taxpayers themselves to know whether or not these taxes were applicable to them. Because of this failure, the Commissioner of Internal Revenue has from time to time determined for himself the applicability of these taxing statutes, both as to the taxpayers involved and as to the type of gambling activity to be taxed. Such determinations, as in the instant case, are often made as much as ten months after the legislation has become effective, and always to the detriment of the individual taxpayer who may be sought out by the Commissioner through his agents. This does not appear to be a desirable state of the law, particularly inasmuch as the particular legislation is concerned with the production and protection of the National revenues, and as such is entitled to an express and explicit determination of its applicability.

The petitioner respectfully urges that the Court of Appeals in rendering its decision in this case, has decided an important question of Federal Tax law, the repercussions of which will have wide-spread effect upon, not only the income tax status and wagering tax status of this petitioner, but also as to all exempt organizations similarly situated; and that in addition thereto, the decision of the Court of Appeals, together with that entered by the District Court and affirmed by the Court of Appeals will have a further wide-spread effect as to the income tax status of exempt organizations engaged in any type of unrelated business activity, which has heretofore not been subject to the provisions of 1939 Internal Revenue Code Sections 421 and 422.

The petitioner further respectfully urges the Court that the Court of Appeals in permitting a decision of the lower court to stand even though arrived at through erroneous findings and conclusions, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, in an effort to achieve in our taxing statutes, that degree of certainty to which the United States of America and most particularly the taxpayers are entitled.

For these reasons, as well as the matters and facts hereinbefore set out, alleged and presented at paragraphs 3 and 5, entitled "Questions Presented" and "Statement of the Case," the petitioner most respectfully urges that the writ herein prayed for may be granted.



John J. Rochford

APPENDIX A

Before Duffy, Chief Judge, Major and Swaim, Circuit Judges.

Major, Circuit Judge. Plaintiff is an American Legion Post located in Indianapolis, Indiana, operating under a charter granted by the National Headquarters of the American Legion. It is a not-for-profit corporation organized under the laws of Indiana. Plaintiff commenced the instant action to recover a refund of wagering taxes in the amount of $12,499.37, paid in 1952, together with interest from the date of payment, pursuant to an assessment by the Commissioner of Internal Revenue under Sec. 3285 (a) of the Internal Revenue Code of 1939 (Title 26 U.S.C.A. Sec. 3285(a)). The District Court rendered judgment in favor of the defendant, from which plaintiff appeals.

The principal contentions here are that the court erred (1) in its denial of plaintiff's motion for summary judgment, (2) in the admission of evidence and (3) in certain of its findings of fact and conclusions of law.

On October 31, 1951, plaintiff purchased from Leo R. Alhand, as evidenced by bill of sale, a business known as "ABC" Lottery, and on November 30 of the same year, acquired in like manner from John Brookes the "Brookes" Baseball Pool. At the time these businesses were transferred to plaintiff, the parties entered into a written agreement which provided for the operation of the baseball pool and lottery by Brookes and Alhand at a stipulated weekly salary. The businesses were thus operated until October 1952, when they were discontinued by plaintiff at the request of the District Office of the American Legion. During the period of these operations plaintiff paid social security and withholding taxes upon the salaries received by Brookes and Alhand as well as other employees. During the period of the operation, the gross receipts from the lottery

business amounted to some $50,000, and those from the baseball pool some $589,000, or a total of some $639,000. The Commissioner assessed a tax of $4,764.33 upon the gross receipts from the lottery and $54,692.74 upon the gross receipts from the baseball pool, or a total assessment of $59,457.07. Plaintiff was the recipient of all net proceeds derived from the two operations, which amounted to $3,099.94 on the lottery and $18,973.90 on the baseball pool. During the same period plaintiff's gross receipts from dues and other sources amounted to $11,878.48.

It is conceded that during the relevant period plaintiff was a corporation exempt from Federal income tax under the provisions of Sec. 101(8) of the Internal Revenue Code (Title 26 U.S.C.A. 1952 ed., Sec. 101 (8)).

Prior to the institution of the instant action, Leo R. Alhand died and probate proceedings were had on his estate in the Probate Court of Marion County, Indiana. In those proceedings the United States filed a written claim based upon the same assessment as that involved in the instant case. The Probate Court denied the claim and in doing so entered its findings of fact and conclusions of law. Among other things, the court found "That Edgewood American Legion Post #448, Inc., is not liable for the wagering excise tax under Section 3285 of the Internal Revenue Code." It also entered the following conclusions of law:

> "2. This claim requires the interpretation of Section 3285 and Section 3290 of the Internal Revenue Code.
>
> "5. That Edgewood American Legion Post #448, Inc., is not a person liable for wagering excise tax within the pervue of Section 3285(b)(2)(B) of the Internal Revenue Code."

Plaintiff earnestly contends here, as it did in the District Court, that the decision of the Probate Court, together with its findings and conclusions of law, is a final and conclusive determination of the issue presently involved and that the government is precluded from maintaining the present action under the doctrine of res adjudicata or collateral estoppel. It was upon this basis that plaintiff sought a summary judgment in its favor. The District Court apparently agreed with the plaintiff in part, as is evidenced by its finding that the government because of the Probate Court proceedings is estopped from asserting that portion of its claim based upon the taxes assessed upon the proceeds from the lottery which Alhand operated for and on behalf of plaintiff.

Both sides cite a number of cases asserted to support their respective contentions upon this issue. It appears unnecessary to cite other than Commissioner v. Sunnen, 333 U.S. 591, relied upon by both sides, wherein the court cites and discusses its previous opinions. Our study of Sunnen and other cases leads us to the conclusion that the doctrine under discussion is without application and that the government is not estopped in the instant litigation. The parties before the Probate Court were the government and the representative of the estate of Alhand. Neither the instant plaintiff nor Brookes was a party, and the instant plaintiff was not in privity with the estate of Alhand. More than that, there was no mutuality of estoppel. If the government is estopped from asserting its claim because of an adverse ruling by the Probate Court, then by the same token the instant plaintiff would be estopped from asserting a defense if the ruling of that court had been adverse to it, and this in a proceeding in which it was not a party. We doubt if such a contention could be seriously advanced.

We think it unnecessary to discuss in detail plaintiff's criticism directed at certain of the findings made by the District Court. Perhaps the most urgent criti-

cism is directed at the finding that the transfer of the lottery and baseball pool businesses to plaintiff by Alhand and Brookes, respectively, was not bona fide and was made for the purpose of avoiding the wagering excise tax. Plaintiff contends that the transfers were in good faith and that as a result it became the sole owner and operator of these businesses. We assume for the purpose of decision that such was the case, which makes it unnecessary to resolve any doubt which exists as to the validity of the finding. Frankly, however, we do not discern the reason for plaintiff's insistence on this point unless it be that absent ownership and operation it would not be in a position to claim the exemption subsequently discussed.

As already noted, plaintiff was an organization exempt from the payment of income tax under Sec. 101(8), which, in our view, is of no aid to plaintiff in the instant matter. This is so because the assessment under consideration was made under Sec. 3285 of the Code, entitled "Wagering Taxes," and any exemption to which plaintiff may be entitled must be found within the terminology of that section.

It appears pertinent to quote the relevant provisions of the section. They are as follows:

> "(a) Wagers. There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.
>
> "(b) Definitions. For the purpose of this chapter --
>
> (1) The term 'wager' means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such

pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under Section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

" * * *

"(d) Persons liable for tax. Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under the subchapter on all wagers placed in such pool or lottery."

Thus, it will be noted that the statute in defining the term "lottery" specifies that it shall not include "any drawing conducted by an organization exempt from tax under Section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual." This is the sole language contained in the section which furnishes any basis for plaintiff's claimed exemption.

Plaintiff contends that this exemption applies both to the proceeds of a "wager" as defined in (b)(1) and to

the proceeds of a "lottery" as defined in (b)(2), and that under such exemption the proceeds derived from the baseball pool and the lottery were exempt from the tax. With this contention we do not agree. A reading of the section makes it plain, so we think, that the exemption is limited to the proceeds of a lottery and not those derived from wagers, as those two terms are defined.

Plaintiff also argues that the proceeds from the baseball pool were not subject to a tax because its operation did not constitute "any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit." This argument is based on the theory that the winner was determined by the number of runs scored in baseball games during the season rather than on the result of any particular game; that during the non-baseball season the winner depended upon the result of certain games played during the previous season, the games used being determined with reference to bank clearings, and that on Saturdays and Sundays, when no bank clearings were available, a pea-shake was employed to determine the day of the previous baseball season to be used. This argument is little more than an exercise in semantics and in our view is without merit. The operation constituted a wagering pool, the winner of which was determined by reference to the happenings of a sports event. The particular manner in which such event was used in determining the winner is beside the point. The baseball pool as conducted was a wagering pool within the statutory definition and, as already shown, was conducted by plaintiff for its profit.

The right of the government to tax the proceeds from the lottery presents a more difficult question. The winners of the lottery were determined by shaking lettered and numbered peas from a partitioned box. The question is, did this operation constitute "any drawing," as those words are used in the exemption provision? In

our view, the question must be answered in the negative under the circumstances of the case. The legislative history of the Act indicates that it was the intention of Congress to exempt the occasional drawing conducted by organizations exempt from tax under Sec. 101. See 1951 U.S. Code Congressional and Administrative Service, pages 1839, 1840 and 1841. If Congress had intended otherwise, it is reasonable to assume that it would have employed more definite and certain language. In the instant case plaintiff was the owner and engaged in the operation of a gambling establishment of considerable magnitude. The business was operated not by its members but by high-salaried employees, trained and experienced in the wagering and lottery field, for the benefit and profit of plaintiff. Under such circumstances, it is not, in our judgment, entitled to the exemption.

Furthermore, plaintiff could not prevail even though we agreed with its contention that the lottery proceeds were exempt from tax. This is so for the reason that the tax assessed upon the receipts from the baseball pool was far in excess of that paid by plaintiff and sought to be recovered. Such being the case, the issue as to the taxability of the lottery proceeds is of no consequence.

We think there is no merit in plaintiff's contention relative to the erroneous admission of evidence. We also discern no occasion to discuss further the findings of the District Court of which plaintiff complains. This court will affirm a proper judgment even though we may not agree with all the reasoning employed by the trial court in arriving at the result. In our view, the judgment in the instant case was proper. It is, therefore,

AFFIRMED.

APPENDIX B

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 1952 ed., Section 101. Exemptions from tax on corporations. -- Except as provided in paragraph 12 (B) and in Supplement U, the following organizations shall be exempt from taxation under this chapter) -- (Sec. 1 to 476 of this title) --

(8) Civic Leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes;

(12)(A) Farmers', fruit growers', or like associations etc. --

(B) An organization exempt from taxation under the provisions of subparagraph (a), etc. --

(Note: The provisions of paragraph (12)(B) have no application to paragraph 8).

(19) ---

An organization operated for the primary purpose of carrying on a trade or business for profit shall not be exempt under any paragraph of this section on the ground that all of its profits are payable to one or more organizations exempt under this section from taxation. For the purposes of this paragraph the term "trade or business" shall not include the rental by an organization of its real property (including personal property leased with the real property).

Notwithstanding paragraph 12 (B) and supplement U, an organization described in this section (other than in the preceding paragraph) shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

Supplement U. Taxation of Business Income of Certain Section 101 Organizations.

26 U.S.C. 1952 ed., Section 421. Imposition of tax. -- (a) In General. -- There shall be levied, collected, and paid for each taxable year beginning after December 31, 1950 --

(1) upon the Supplement U (Sect. 421 to 424 of this title) net income (as defined in subsection (c) of every organization described in subsection (b)(1), a normal tax of 25 per centum of the Supplement U net income, and a surtax of 22 per centum of the amount of the Supplement U net income in excess of $25,000; except that (A) in the case of taxable years beginning before April 1, 1951, and ending after March 31, 1951, the normal tax shall be 28-3/4 per centum of the Supplement U net income, and (B) in the case of taxable years beginning after March 31, 1951, and before April 1, 1954, the normal tax shall be 30 per centum of the Supplement U (Sec. 421 of this title) net income.

(2) upon the Supplement U net income of every trust described in subsection (b)(2), a normal tax computed at the rate and in the manner provided in section 11 and a surtax computed at the rates and in the manner provided in Section 12(b). In making such computations for the purposes of this section, the term "the amount of the net income in excess of the credits against net income provided in Section 25" as used in Section 11 shall be read as "the amount of the Supplement U net income and the term "surtax net income" as used in

Section 12(b) shall be read as "Supplement U net income."

(b) Organizations subject to tax. -- (1) Organizations taxable as corporations. --

(A) Organizations Exempt under Section 101 (1), (6), (7) and (14). -- The taxes imposed by subsection (a)(1) shall apply in the case of any organization (other than a church, a convention or association of churches, or a trust described in paragraph (2) which is exempt, except as provided in this supplement, from taxation under this chapter by reason of paragraph (1), (6), or (7) of Section 101. Such taxes shall also apply in the case of a corporation described in Section 101 (14) if the income is payable to an organization which itself is subject to the tax imposed by subsection (a) or to a church or to a convention or association of churches.

(B) State Colleges and Universities. -- The taxes imposed by subsection (a)(1) shall apply in the case of any college or university which is an agency or instrumentality of any government or any political subdivision thereof, or which is owned or operated by a government or any political subdivision thereof or by any agency or instrumentality of any one or more governments of political subdivisions. Such taxes shall also apply in the case of any corporation wholly owned by one or more such colleges or universities.

(2) Trusts taxable at individual rates. -- The taxes imposed by subsection (a)(2) shall apply in the case of any trust which is exempt, except as provided in this supplement, from taxation under this chapter by reason of paragraph (6) of Section 101 and which, if it were not for such exemption, would be subject to the provisions of Supplement E.

(c) Definition of Supplement U net income. -- The term "Supplement U net income" of an organization means

he amount by which its unrelated business net income as defined in Section 422) exceeds $1,000.

d) Foreign organizations. -- The Supplement U net income of an organization described in subsection (b)(1) or (2) which is a foreign organization shall be its Supplement U net income derived from sources within the United States determined in accordance with the rules of Section 119 and Sections 212, 213 (a), 231 (c) and (d), and 232 (a).

26 U.S.C. 1952 ed., Section 422. Unrelated business net income. -- (a) Definition. -- The term "unrelated business net income" means the gross income derived by any organization from any unrelated trade or business (as defined in subsection (b) regularly carried on by it, less the deductions allowed by Section 23 which are directly connected with the carrying on of such trade or business, subject to the following exceptions, additions, and limitations:

(1), (2), etc. ----

(b) Unrelated trade or business. -- The term "unrelated trade or business" means, in the case of any organization subject to the tax imposed by Section 421 (a), any trade or business the conduct of which is not substantially related (aside from the need of such organization for income or funds or the use it makes of profits derived) to the exercise or performance by such organization of its charitable, educational, or other purpose or function constituting the basis for its exemption under Section 101 (or, in the case of an organization described in Section 421(b)(1)(B), to the exercise or performance of any purpose or function described in Section 101 (6), except that such term shall not include any trade or business. --

(1), (2), etc. ----

26 U.S.C. 1952 ed., Section 3285. Tax. -- (a) Wagers. -- There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) Definitions. -- For the purposes of this chapter (Sec. 3285 et seq. of this title) --

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, Policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under Section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

(c) Amount of wager. -- In determining the amount of any wager for the purposes of this subchapter (Sect. 3285 to 3287 of this title), all charges incident to the placing of such wager shall be included; except that if the taxpayer establishes, in accordance with regulations prescribed by the Secretary, that an amount equal to the tax imposed by this subchapter has been collected as a separate charge from the person placing such wager, the amount so collected shall be excluded.

(d) Persons liable for tax. -- Each person who is engaged in the business of accepting wagers shall be li-

able for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter (Sect. 3285 to 3287 of this title) on all wagers placed in such pool or lottery.

(e) Etc. ----

(As added Oct. 20, 1951, c. 521, Title IV, Part VII, Sect. 471 (a), 65 Stat. 529.)

26 U.S.C. 1952 ed., Section 3290. Tax. -- A special tax of $50 per year shall be paid by each person who is liable for tax under subchapter A (Sect. 3285 to 3287 of this title) or who is engaged in receiving wagers for or on behalf of any person so liable. (As added Oct. 20, 1951, c. 521, Title IV, Part VII, Sect. 471 (a), 65 Stat. 529.)

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No. 653

In the Supreme Court of the United States

OCTOBER TERM, 1957

EDGEWOOD AMERICAN LEGION POST #448, INC.,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 246 F. 2d 1. (Pet. 11–17.) The findings of fact and conclusions of law of the District Court (R. 6–13[1]) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 12, 1957, and a petition for rehearing was denied on September 9, 1957. The petition for certiorari was filed on December 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

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[1] Record references are to the appendix to the taxpayer's brief in the Court of Appeals.

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that the United States, seeking to recover a wagering tax against the taxpayer on the proceeds of a baseball pool and a lottery, was not estopped by a prior judgment entered by a state probate court in a proceeding to which the taxpayer was not a party and which involved only the liability of a third party for the wagering tax on the proceeds of the lottery.

2. Whether the Court of Appeals correctly held that the baseball pool comprised a wagering pool with respect to a sports event or contest and that hence the exemption from the wagering tax did not apply.

3. Whether the Court of Appeals correctly held that the taxpayer's extensive lottery activities were likewise not entitled to the wagering tax exemption.

STATUTE AND REGULATIONS INVOLVED

Sections 101 (8) and 3285 of the Internal Revenue Code of 1939, and Sections 325.20 and 325.24 of Treasury Regulations 132, are set forth in the Appendix, *infra*, pp. 10–12.

STATEMENT

In this action, the taxpayer, an American Legion Post, sued for a refund of wagering taxes in the amount of $12,499.37 paid by it in 1952 pursuant to an assessment by the Commissioner of Internal Revenue under Section 3285 of the Internal Revenue Code of 1939. The District Court gave judgment for the Government, and the Court of Appeals unanimously affirmed.

As of November 1, 1951, Section 3285 imposed a ten percent excise tax on specified types of wagering. The Commissioner assessed the taxpayer and/or estate of Leo R. Alhand, as joint venturers, taxes and penalties in a total amount of $4,164.33 for the period November 1951 through June 1952 as being due on the operation of the "ABC" lottery, and assessed taxpayer and/or John Brookes, as joint venturers, taxes and penalties for the same period in a total amount of $54,692.74 as being due on the gross receipts of the "Brookes" baseball pool. (R. 6.)

On November 30, 1951, the taxpayer executed a purported bill of sale with John Brookes whereby for a recited consideration of $50 Brookes ostensibly sold the "Brookes" baseball pool (hereafter referred to as the baseball pool), a wagering pool operated by Brookes, to the taxpayer. At the same time, the taxpayer and Brookes entered into a written agreement whereby the taxpayer purported to employ Brookes to manage the baseball pool for a stated salary of $200 per week. (R. 9.) The District Court found that the relationship existing between the taxpayer and Brookes during the operation of the baseball pool was that of joint venturers operating for mutual profit which inured to the benefit of each party. (R. 10.)

The baseball pool was operated by chance, the winners being determined by the runs scored in baseball games during the baseball season. Out-of-season, the winners were also determined by baseball games in the following manner: bank clearings were used to determine which day of a prior baseball season was

to be used to determine the winner; on Saturdays and Sundays when there were no bank clearings, a pea-shake was used to determine which day of a prior baseball season was to be used. (Supp. R. 35–36.)[2] The District Court found that this pool involved wagers placed in a wagering pool with respect to a sports event and that it was conducted for profit. (R. 10.)

On October 31, 1951, the taxpayer purchased from Leo R. Alhand, now deceased, a business known as the "ABC" Lottery (hereafter referred to as the lottery). On that date, a "bill of sale" was executed whereby for a recited consideration of $25 Alhand transferred the lottery to the taxpayer. At the same time, the taxpayer and Alhand entered into a written agreement whereby taxpayer employed Alhand to operate the lottery at a stated salary of $125 per week. (Pet. 11; R. 7.) Prior to this date, Alhand had operated the business as a weekly lottery. (R. 9.) The winners in the lottery were determined by the use of lettered and numbered peas in a partitioned box. Upon shaking the box, the peas were dropped in a slide. (Supp. R. 35.)

Prior to the instant action and after the above assessments had been made, a claim based upon the assessments was filed by the United States against the estate of Leo R. Alhand. After a trial upon the merits of this claim, the Probate Court of Marion County, Indiana, rendered judgment in favor of the estate and against the United States. (R. 8.) In its

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[2] "Supp. R." refers to Appendix B to the Government's brief in the Court of Appeals.

decision, the Probate Court stated, *inter alia*, that Edgewood American Legion Post #448, Inc., is not a person liable for wagering excise tax under Section 3285 (b) (2) (B) of the Internal Revenue Code." (Supp. R. 45.) Taxpayer, however, was not a party to this proceeding in the Probate Court.

As of November 1, 1951, the taxpayer was a patriotic and civic organization exempt from federal income tax under the provisions of Section 101 (8) of the Internal Revenue Code of 1939. Since November 1, 1951, there has been no change in the charter or organization of the taxpayer. (R. 8.) Conduct of the lottery and baseball pool was terminated in October 1952 at the request of the District Office of the American Legion. (R. 10.)

In affirming the District Court's dismissal of taxpayer's complaint, the Court of Appeals held that the Government was not estopped by the Indiana Probate Court's statement as to taxpayer's claimed exemption and that taxpayer's gambling operations fell within the scope of Section 3285.

ARGUMENT

Contrary to the assertions of the taxpayer, this case does not involve any questions of importance. The decision of the Court of Appeals is clearly correct and does not conflict with the decision of any other Court of Appeals.

1. The Government is not estopped by the holding of the Probate Court of Marion County, Indiana, in the matter of the estate of Leo R. Alhand, from asserting its right to assess the wagering tax against the taxpayer herein who was not a party in the probate

proceeding. That proceeding involved an action by the Government against the estate of Leo R. Alhand to collect wagering taxes on the lottery, and did not even concern the baseball pool. Under the decisions of this Court, the principles of *res judicata* or collateral estoppel do not apply where, as here, the parties are not the same or in privity, different facts are in controversy, and there is no mutuality of estoppel. See *Commissioner* v. *Sunnen*, 333 U. S. 591.

2. There is no exemption from wagering taxes provided for the receipts of either the baseball pool or the lottery.

The taxpayer, as an American Legion Post, was granted an exemption from federal income taxation under the provisions of Section 101 (8) of the Code (Appendix, *infra*, p. 10). This exemption by its terms refers to income tax only, and thus it cannot apply to the wagering taxes here involved in the absence of a specific provision in the wagering tax sections making it so pertinent. Section 3285 of the Internal Revenue Code of 1939 (Appendix, *infra*, pp. 10–11), which provides for the imposition of the wagering tax, sets forth only one narrowly worded exemption relevant to such tax. This exemption clearly does not apply to the situation at bar.

Both the District Court and the Court of Appeals held that the baseball pool involved wagers placed in a wagering pool with respect to a sports event and was conducted for profit. The statute imposes the tax on "wagers", which subsection (b) (1) defines to be in material part: "(B) any wager placed in a wagering

pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit." Subsection (b) (2) (B) then declares that the term "lottery" (as used in (C) above) does not include "any drawing conducted by an organization exempt from tax under section 101." Thus, as to wagering pools, there is no exemption whatsoever set forth in the statute.[3] And the finding that the baseball pool involved wagers placed in a pool with respect to a sports event was a finding of fact which is well supported by the testimony of the taxpayer's own witness. (Supp. R. 35–36.)[4]

3. The lottery activities of the Post, like the baseball pool, were of considerable scope and magnitude.

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[3] The Revenue Service, by ruling, has recognized the exclusion of wagering pools such as that here involved from the exemption. M. T. 44, 1952–2 Cum. Bull. 251, 252, issued under the statute, provides as follows:

"Where the winner is determined by the outcome of any designated event or happening, or by bank clearing or similar figures, the operation is not a 'drawing' within the contemplation of the statute. It is believed that the term 'drawing' refers to a physical drawing of a ticket, or the equivalent thereof, such as the use of a wheel or a similar device, whereby the winner is conclusively determined by a number, letter, legend, or symbol, without reference to any other event the happening of which is beyond the control of the operator."

[4] It should also be noted that the tax and penalty due on the baseball pool ($54,692.74) far exceed the tax paid ($12,499.37). Therefore, if taxpayer is not exempt from tax on the pool, there is no overpayment in this action, regardless of whether or not the taxpayer is exempt from tax on the lottery. See, *e. g.*, *Helvering* v. *Taylor*, 293 U. S. 507, 514.

The record shows that the gross profit from sales of tickets for the years 1951 and 1952 (the only years of operation) was $639,753. (R. 10.) The winners of the lottery were determined weekly by use of a pea shake. If this activity is entitled to an exemption, it must fit within that contained in Section 3285 (b) (2):

> The term "lottery" * * * does not include * * * (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

The legislative history of Section 3285 (b) makes it apparent that Congress, by the use of the word "drawing", meant the occasional raffle of a car or other merchandise for some worthy cause.[5] It was felt that limited and worthwhile raffles should not be classed with and taxed with large-scale organized gambling, and the exemption was therefore granted

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[5] Congressman Reed (Chairman of the House Ways and Means Committee) explained the meaning of this Section as follows (97 Cong. Record, Part 5, p. 6896):

"The bill places a ten percent tax on bets, principally those made with bookmakers and lottery operators, and imposes a $50 a year occupational tax on such professional gamblers and their agents. Parimutuel betting is exempt. Activities such as bingo and cards are also exempt, mainly because the type of tax imposed by the bill is not suitable to those games, and because such games are frequently played on a social rather than professional basis. *Moreover, the bill exempts raffles such as are occasionally conducted by churches and veterans' organizations. It is believed that the bill will cover 90 percent or more of the total professional gambling.*" [Emphasis supplied.]

for physical drawings limited as to frequency and scope of operations. This interpretation of the congressional intent is confirmed by two recent cases: *Hessman* v. *Campbell,* 134 F. Supp. 416, 418 (S. D. Ind.), and *Woodard* v. *Campbell,* 134 F. Supp. 258 (S. D. Ind.), affirmed, 235 F. 2d 268 (C. A. 7th). The lottery run by taxpayer is clearly not the sort of drawing Congress intended to exempt from the wagering tax.[6]

CONCLUSION

The decision below is correct, there is no conflict with any other decision, and no reason appears which would warrant review by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1958.

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[6] The taxpayer also complains that the court below erred in failing to discuss certain grounds relied upon in part by the District Court as the basis of its decision. However, as the court below stated (Op., p. 5), the rule is well settled that an appellate court "will affirm a proper judgment even though [it] may not agree with all the reasoning employed by the trial court in arriving at the result." See *Helvering* v. *Gowran,* 302 U. S. 238.

APPENDIX

Internal Revenue Code of 1939:

SEC. 101 [as amended by Sec. 391 (c) (1) (A), Revenue Act of 1950, c. 994, 64 Stat. 906, and Sec. 314 (b) (1), Revenue Act of 1951, c. 521, 65 Stat. 452]. EXEMPTIONS FROM TAX ON CORPORATIONS.

Except as provided in paragraph (12) (B) and in supplement U, the following organizations shall be exempt from taxation under this chapter—

* * * * *

(8) Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

* * * * *

(26 U. S. C. 1952 ed., Sec. 101.)

SEC. 3285 [as added by Sec. 471, Revenue Act of 1951, *supra*]. TAX.

(a) *Wagers.*—There shall be imposed on wagers, as defined in subsection (b), an excise tax equal to 10 per centum of the amount thereof.

(b) *Definitions.*—For the purposes of this chapter—

(1) The term "wager" means (A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers, (B) any wager placed

in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and (C) any wager placed in a lottery conducted for profit.

(2) The term "lottery" includes the numbers game, policy, and similar types of wagering. The term does not include (A) any game of a type in which usually (i) the wagers are placed, (ii) the winners are determined, and (iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game, and (B) any drawing conducted by an organization exempt from tax under section 101, if no part of the net proceeds derived from such drawing inures to the benefit of any private shareholder or individual.

* * * * *

(d) *Persons Liable for Tax.*—Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery.

* * * * *

(f) *Territorial Extent.*—The tax imposed by this subchapter shall apply only to wagers (1) accepted in the United States, or (2) placed by a person who is in the United States (A) with a person who is a citizen or resident of the United States, or (B) in a wagering pool or lottery conducted by a person who is a citizen or resident of the United States.

(26 U. S. C. 1952 ed., Sec. 3285.)

Treasury Regulations 132, promulgated under the Internal Revenue Code of 1939:

SEC. 325.20. *Effective period.* The tax on wagers imposed by section 3285 is effective with respect to wagers placed on or after November 1, 1951.

SEC. 325.24. *Person liable for tax.*—(a) Every person engaged in the business of accepting wagers with respect to a sports event or a contest is liable for the tax on any such wager accepted by him. Every person who operates a wagering pool or lottery conducted for profit is liable for the tax with respect to any wager or contribution placed in such pool or lottery. To be liable for the tax, it is not necessary that the person engaged in the business of accepting wagers or operating a wagering pool or lottery physically receive the wager or contribution. Any wager or contribution received by an agent or employee on behalf of such person shall be considered to have been accepted by and placed with such person.

(b) If a person engaged in the business of accepting wagers or conducting a lottery or betting pool for profit lays off all or part of the wagers placed with him with another person engaged in the business of accepting wagers or conducting a betting pool or lottery for profit, he shall, notwithstanding such lay-off, be liable for the tax on the wagers or contributions initially accepted by him. See section 325.34 for the credit and refund provisions applicable with respect to laid-off wagers.